IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.475 OF 2005

Larsen & Toubro Limited Petitioners
L & T House, Ballard Estate,
Bombay 400 001.

Versus

1. The State of Maharashtra

2. The Project Commissioner,
   Maharashtra Health Systems
   Development Project, Ministry
   of Health, Govt. of Maharashtra,
   Mumbai.

3. Rites Limited,
   Boys & Girls Hostel Bldg;
   Ground Floor, Saint George's
   Hospital Compound, P.D'Mello Road,
   Mumbai 400 001.

4. International Development
   Association, The World Bank,
   70, Lodi Estate,
   New Delhi 110 003. Respondents

Mr.Sharukh Kathawala with Mr.P.A.Sawant, Mr.Vikram Trivedi and Mr.Faisal Sayyed i/b. Manilal Kher Ambalal & Co. for petitioners.

Mr.Niranjan Pandit, A.G.P. for respondent Nos.1 and 2.

Other respondents are served.

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   70, Lodi Estate,
   New Delhi 110 003.

5. M/s.WIPRO-GE Medical Systems,
   Laxmi Commercial Complex,
   Third Floor,
   Senapati Bapat Marg, Dadar (W),
   Mumbai 400 028. Respondents

Mr.Sharukh Kathawala with Mr.P.A.Sawant, Mr.Vikram Trivedi and Mr.Faisal Sayyed i/b. Manilal Kher Ambalal & Co. for petitioners.

Mr.Niranjan Pandit, A.G.P. for respondent Nos.1 and 2.

Mr.P.C.Mody i/b. Mustafa Motiwala for respondent No.5.

Other respondents are served.

CORAM : H.L.GOKHALE AND S.C.DHARMADHIKARI, JJ.

DATE : 27th April 2005.

ORAL JUDGEMENT (Per Dharmadhikari, J) :-

. Rule on both the petitions. By consent

rule made returnable forthwith. The presence of IDA - World Bank dispensed with. Mr.N.P.Pandit and Mr.P.M.Modi waive service for State Government and successful bidder respondent no.5 in the second petition. As common questions arise and since petitions were heard together they are being disposed of by this common order.

2. Petitioners, Larsen and Toubro Ltd. have challenged in these petitions the action of respondents nos.1 and 2 in rejecting their bids for supply of certain equipments/machines which were to be installed at District and Civil Hospitals in the State. The grievance is that the rejection of their bids as non-responsive is wholly arbitrary, discriminatory and violative of mandate of Article 14 of the Constitution of India.

3. The first respondent State in these petitions initiated the process of inviting bids from manufacturers/importers of medical equipment for supply of Modular Monitors amongst other items. It is not in dispute that pursuant to the invitation for bids 13 manufacturers/ suppliers forwarded their bids. It is further not in

dispute that the terms and conditions of the tender vide clause 11.1 provide for price to be quoted by the bidders and clause 24.4 provides for rejection of bids as being non responsive if it stipulates material deviations including on the basis of Taxes and Duties.

4. Details pertaining to the submission of bids, their scrutiny and decision thereon together with time schedule prescribed therefor, need not be adverted to for appreciating the submissions of Mr.Kathawala, learned Counsel appearing for petitioners.

5. In pursuance of invitation of tender vide communication dated 6th July 2004, petitioners forwarded their bids enclosing therewith relevant documents. They had quoted the price for each of the equipment/ machine sought for by the purchasers viz., State of Maharashtra and the concerned Project Commissioner. While forwarding the bid insofar as price quotation is concerned, after referring to the schedule of the items and the prices thereof, this is what is stated by petitioners:-

> " Prices quoted are for supply of FOR station of dispatch basis considering Excise Duty (0%) and Custom Duty (0%) on components under Deemed Export Benefit. Sales Tax (4%) against H-Form (or equivalent) and packaging, freight/ insurance charges have been separately indicated in the quotation. Any change in Government policies, Statutory variations in Excise duty, sales tax and other Government levies, if any, will be to your account."

6. It is contended by Mr.Kathawala that merely because the petitioners, while quoting the price have stated that any taxes or levies pursuant to Government policies being changed in future, they will be leviable on Account of State, does not mean that the price quoted is not fixed. In other words, he submits that the price quoted was fixed and not variable. He submits that bids meet the requirement of the tender condition and more particularly clause 11 referred to above. If that be not the case, it was not necessary for the State and its officials to scrutinise the bids insofar as the technical requirements are concerned. Having processed the bids, the rejection thereof merely on the ground of material deviation on account of taxes and duties, as non responsive is grossly unfair, unjust and arbitrary. Mr.Kathawala submits that

the State has discriminated inasmuch as one of the bidders M/s.Schiller had also quoted their price in identical manner with price variation on account of taxes and duties for another product in the very same Tender Notice. However, their bid was not rejected as being non responsive, but considered on merits. This information is placed on affidavit of 22nd March 2005 but there is no counter thereto. Therefore, assuming without admitting that the bids of petitioners could have been rejected as non responsive, the State and its officials are duty bound to explain as to how the bid of this party came to be considered on merits. Mr.Kathawala submits that the decision to reject petitioner's bid as non responsive is vitiated and deserves to be quashed and set aside.

7. Mr.Kathawala pressed into service para 3 of the affidavit of Dr.S.B.Chavan affirmed on 19th March 2005 in Writ Petition No.476 of 2005 which is to the following effect :-

> "3. At the outset, I state that by the amendment the Petitioner has sought to bring on record certain totally irrelevant facts and has also sought to bring into record the various technical

> details to show the purported comparison between the product offered by the Petitioner and the product offered by the Respondent No.5. I state that these are totally irrelevant to the subject matter of the present petition inasmuch as the Petitioner's bid has been rejected because it was not a substantially responsive bid on account of variable bid price. That being so, there is no question of dealing with the various alleged parameters offered by the Petitioner's product in comparison to the Respondent No.5's product. Strictly without prejudice and in any event, I state that the Respondent No.5's product meets all other criteria and is also technically responsive."

8. That apart, Mr.Kathawala submits that insofar as the decision to award the contract in favour of M/s.WIPRO GE Medical systems (Respondent No.5 in W.P.476 of 2005) is concerned, the equipment/ machine which is to be supplied is not a Modular Monitor. The equipment does not meet the technical specifications. In this behalf, he invites our attention to the affidavits placed on record and the brochures of the successful bidder. He submits that in the past whenever such machines/ equipments were supplied by local manufacturers, the officials of Government Hospitals in the State complained about the quality thereof. He drew our attention to the complaints received from the Hospitals at Akola and Nasik which are on record. They

insisted on being supplied a Modular Monitor. He submits that if the technical specifications set out in Schedule II regarding Modular Parameter Physiological Monitor are perused, they clearly state that such multiple parameter have to be modular/ multi-coloured screen of a particular size and there should be flexibility in using any module with monitor. In other words, the technical specifications provided for placing of such multiple parameters on housing rack for convenient movement. This is the product which is being supplied by the petitioners. Therefore, it is false to suggest that the petitioners' equipment/ machine is not technically acceptable. In any event, the affidavit of the State is full of contradictory statements and confusing. If the rejection is only because of the bid being non responsive, then there is no occasion for the State to state about technical qualifications. Therefore, according to Mr.Kathawala, the decision is erroneous and ex facie vitiated even on this count.

9. Mr.Pandit learned Counsel appearing for State submits that petitioners are not the lowest bidders. They have no right to claim the

contract. All that they can urge is that their bid should be considered provided it satisfies the terms and conditions. The terms and conditions provide for fixed price. The price quoted by the petitioners is not fixed but variable. Therefore, the bid has been rightly rejected as non responsive. He submits that as far as first petition is concerned, no final decision has been taken by the authorities as yet. However, the decision taken as early as on 11th October 2004 of awarding the contract to M/s.WIPRO -GE Medical Systems (Respondent No.5) which is disputed in the second petition cannot be faulted at all. He submits that the World Bank is financing and funding this project. The decision to award the contract is to be taken in consultation with the officials of the World Bank. Despite rejecting the bids as non responsive, the State took up the issue with World Bank but the World Bank officials insisted that the price as quoted by the petitioners is not fixed but variable. Therefore, the decision taken to reject the bid as non responsive is not liable to be interfered with.

10. Alternatively, Mr.Pandit submits that the

bids were evaluated and as pointed out on affidavit the technical specifications set out in the tender conditions have not been satisfied by petitioners. He submits that this Court cannot interfere with the decision taken by respondents insofar as evaluation of bids is concerned. He submits that the product has to be supplied expeditiously and, therefore, at this belated stage no interference under Article 226 is permissible and/ or necessary. He relies upon a decision of the Supreme Court in the case of Asia Foundation and Construction Company Ltd. Vs. Trafalgar House Construction (India) Ltd. and Ors., reported in 1997 (1) S.C.C. 738. The Apex Court has observed in that matter that larger public interest is to be kept in view and that in cases of high cost government projects based on loan from International Financial Associations acceptance of tender by Government in accordance with the specifications or opinion of such institution would not be arbitrary or illegal. It is material to note that in that matter the amount of loan involved was to the extent of 134.85 Million US Dollars. In the present matter, in the first case the amount involved is hardly Rs.56.00 lakh and in the second matter

over One and Half Crores.

11. Mr.Modi, learned Counsel appearing for respondent No.5 (WIPRO -GE Medical Systems) submits that as far as the decision of rejecting the bids of petitioners as non responsive is concerned, the State is free to take all steps in accordance with the terms and conditions. However, it is false to suggest that respondent No.5 are supplying machines which are not Modular Monitors. He relies upon the affidavit of Sales Manager of respondent No.5 to demonstrate that his machines DASH-4000 meet the technical specifications and are flexible enough. He submits that the decision to award the contract in favour of 5th respondent is taken as early as on 11th October 2004 and the equipment is kept ready for delivery though the same is not supplied in view of the interim orders of this Court passed on 22nd February 2005. This being the position at this belated stage, this Court should not interfere with the decision. The petitions be dismissed and ad-interim orders be vacated.

12. With the assistance of learned Counsel

appearing for parties we have perused the petitions, their Annexures and all affidavits in reply and rejoinder. It is well settled that all actions in matters of contract by the State have to meet the test of fairness, reasonableness and non arbitrariness as enshrined in Article 14 of Constitution of India. The State cannot discriminate while applying the terms and conditions formulated by it and favour one bidder over other. In the instant case, bid prices have to indicate on the appropriate price schedule attached to the relevant documents, the unit price (wherever applicable) and total bid price of goods that the bidder proposes to supply under the contract.

13. It is not in dispute that bids were invited by Government of Maharashtra under the Maharashtra Health Systems Development Project through RITES Limited. The bidders were to supply bed-side monitors, multi parameter monitors and Defibrillation monitors. As far as the petitioners are concerned, their bid was for supply of multi-parameter monitors. They had admittedly indicated the price of the goods in the price schedule. They had also complied with

other terms and conditions in so far as price is concerned. They indicated the prices separately in the manner set out in clause 11.2(a). All that the petitioners did was to state at the end of their covering letter that the prices quoted are for supply of FOR Station of dispatch basis considering nil excise and customs duties on components. This was because petitioners enjoy deemed export benefit. They specifically indicated that sales tax and packaging freight/ insurance charges have been indicated in the quotation. All that they stated thereafter is that if Government policies change or there are statutory variations in excise duty, sales tax and other Government levy, if any, they will be to the account of State Government.

14. Mr.Pandit appearing for State could not dispute that prices quoted by petitioner were including all customs, excise and other duties as well as other taxes already paid or payable. Admittedly, the price quoted by petitioners indicate that there is no Excise and customs duty. Further, our attention was invited to the amendment to clause 11.2(a) and clause 11.5. A bid submitted with a adjustable price quotation

will be treated as non responsive and will be rejected pursuant to the ITB Clause 24. It is not as if that the bid is liable to be rejected straight away. Even that contingency is taken care of in clause 11.5. Clause 24.4 specifically states that the purchaser will determine the substantial responsiveness of each bid to the bidding documents for purpose of clauses enabling evaluation and comparison of bids.

15. The terms and conditions provide that a substantially responsive bid is liable for evaluation and comparison if it conforms to all the terms and conditions of the bidding documents, without material deviations. As to what are the material deviations is specified in clause 24.4. Clause 24.4 states that if a bid is not substantially responsive, it will be rejected by the Purchaser i.e. State and may not subsequently be made responsive by the bidder by correction of the non -conformities. The clause uses the phrase "Substantial Responsiveness". The very concept of substantially responsive bid means that deviations from or objections or reservations to critical provisions specified in clause 24.4 are material and the bid has to

comply with them but what is material is substantial responsiveness. If the deviation is marginal and not with respect to critical provisions, then the bid is not expected to be thrown out as non responsive only on this ground.

16. In the instant case, from the perusal of the affidavits filed on behalf of the State, it is clear to us that the bids have been rejected as non- responsive. The price according to the State and its officers is not fixed but variable. The State and Respondent No.2 have filed affidavits in reply. In these affidavits it is emphasised that the petitioners bid has been rejected because it was not a substantially responsive one on account of variable price. Mr.Pandit asserted this stand before us.

17. In the further affidavits filed the petitioners have pointed out to us as to how a bidder identically situated as that of petitioners has been evaluated and compared by the State and the authorities. The case of the bidder M/s.Schiller Health Care India Pvt.Ltd. who was to supply the item Defibrillator is more or less identical to that of petitioners. The

terms and conditions of supply forwarded by M/s.Schiller contained an identical stipulation providing for price variation. Despite such a bid being forwarded, the respondents not only evaluated and considered the same but also awarded the contract vide communication dated 11th October 2004. Hence, it is clear that the respondents have favoured M/s.Schiller and at the same time discriminated against the petitioners. The State is obliged to apply the terms and conditions of the tender/ bid uniformly in case of all bidders. It cannot pick and choose bidders for favourable treatment. It is not permissible to make distinction between one bidder and other once they are identically situated. In the instant case, but for the nature of the machines every thing else in case of M/s.Schiller and the petitioners is identical. They have given their bids under the same tender document though for different instruments. Therefore, the decision to reject the petitioners' bid as non responsive cannot be sustained.

18. Insofar as technical specifications are concerned, from a perusal of the affidavits it is

clear to us that the bid submitted by petitioners has not been evaluated and compared in the light of the terms and conditions as well as the product specifications. The features are set out in the brochures of petitioners and respondent No.5. Ultimately, this is a project for supply of modern equipment/ machines necessary for diagnosis and treatment of patients admitted to and being treated at State Hospitals. The State has to procure quality machines at competitive price. We are not suggesting for a moment that petitioners bid deserves to be accepted. What is necessary is scrutiny, evaluation and comparison in the light of the terms and conditions of the tenders. That must be undertaken and it should be fair as well as reasonable and just. If the product is a quality product, then the same must be accepted in public interest.

19. Submission of Mr.Pandit that petitioners are not the lowest bidders does not impress us. We cannot ignore the submissions of Mr.Kathawala in that behalf that the product of petitioner is in total and exact conformity of the tender requirements and that of respondent no.5 is not (which Mr.Mody disputes) and if the petitioner

were to supply the equipments similar to that of respondent no.5, their price could have been much lower. Ultimately, public interest demands transperancy and fairness in contractual dealings by the State. The mandate of Article 14 has to be satisfied by the State and its officials even in contractual matters. If petitioners have been wrongfully excluded at the threshold then they have every right to approach this Court. The decisions have to be taken on the touch stone of fairness and reasonableness as enshrined in Article 14 of the Constitution of India and the moment there is violation of that mandate, the complaint of any bidder cannot be brushed aside on the ground that he is not the lowest bidder. The decision of the Supreme Court relied upon by Mr.Pandit is wholly distinguishable. Apart from the high cost involved, there the Supreme Court reversed the judgement of Orissa High Court on account of delay. The decision to re-bid was also not found to be in public interest. Here, the cost is not very substantial and there is no question of delay. Supplies are yet to commence. Further, Public interest requires our interference.

20. In the light of the aforesaid, petitions deserve to succeed. State of Maharashtra and the Project Commissioner, Maharashtra Health Service Development Project are directed to consider petitioners bid in the light of the terms and conditions stipulated in the bidding documents. As a consequence thereof, the decision taken on 11th October 2004 to award the contract to respondent No.5 in the second matter is quashed and set aside.

21. The further consequence of the aforesaid order and direction would be that the tender process should commence afresh. However, we are aware that the machines are to be supplied to Government and civil hospitals through out the State and as early as possible. The said machines are required for diagnosis and treatment of the patients, majority of whom are from poor section of the society. Therefore, although, we have quashed the decision to award the contract and directed re-consideration of the bid submitted by the petitioners herein, the State would not be obliged to float a fresh bid or tender inviting participation from public at large. The State and the Project Commissioner

may consider only those bids which are submitted in pursuance of invitation of bids (Exh.A to the Writ Petitions) and none else. This direction would meet ends of justice and will also be in conformity with the principles of fairness and reasonableness enshrined in Article 14 of the Constitution of India keeping in consideration the requirements and urgency of the State also. It is, however, for the State to take the necessary decision in this behalf.

22. Rule is made absolute in above terms with no orders as to costs.

(H.L.GOKHALE, J)

(S.C.DHARMADHIKARI, J)